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No. 05-260

IN THE

Supreme Court of the United States

JOEL SEREBOFF and MARLENE SEREBOFF,
Petitioners,

v.

MID ATLANTIC MEDICAL SERVICES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE BLUE CROSS BLUE SHIELD ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENT

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INTEREST OF THE AMICUS CURIAE

The Blue Cross Blue Shield Association (the "Association") is the trade association that coordinates the national interests of the independent, locally operated Blue Cross and Blue Shield Plans.[1] Together, the 38 member Blue Cross and Blue Shield

[1] In accordance with Rule 37.6, the Association certifies that counsel for a party did not author this brief in whole or in part and that no entity other than the Association, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

Plans provide health insurance benefits to more than 94 million people – nearly one-third of all Americans – in all 50 states, the District of Columbia, and Puerto Rico. The Plans offer a variety of insurance products to all segments of the population, including large public and private employer groups, small businesses, and individuals.

The Blue Cross and Blue Shield Plans are subject to regulation under a variety of federal and state statutes, including the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* This case concerns the extent to which ERISA § 502(a)(3), 5 U.S.C. § 1132(a)(3), authorizes fiduciaries administering ERISA plans to bring civil actions to enforce reimbursement provisions in those plans. These provisions require the plan participant to reimburse medical expenses paid by the plan if the participant recovers money from a third party responsible for the illness or injuries that gave rise to the medical expenses.[2]

The Blue Cross and Blue Shield Plans administer or insure ERISA plans that often include such reimbursement provisions. The funds they collect help reduce the overall costs for providing ERISA benefits through the avoidance of duplicative recoveries by the affected participants. That is, absent reimbursement, some plan participants would receive double recoveries, at the expense of other plan participants, who necessarily would experience higher premiums or reduced benefits to compensate for the plan's lost reimbursement income. If the

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[2] The plan "participant" is the employee or former employee who is eligible to receive benefits under the employee benefits plan. 29 U.S.C. § 1002(7). The reimbursement provisions also apply to plan "beneficiaries" – those individuals the plan or plan participant designates as entitled to benefits as a result of their relationship with the participant. *See* 29 U.S.C. § 1002(8). For simplicity's sake, this brief will use "participant" to refer both to participants and to beneficiaries.

decision below is reversed, Blue Cross and Blue Shield entities and others administering or insuring ERISA plans will have no way to enforce reimbursement provisions, thus causing significant negative financial consequences to ERISA plans and their participants. Accordingly, the Association has a strong interest in the outcome of this case.

Counsel for the parties have filed letters with the Clerk of the Court providing consent to the filing of amicus curiae briefs supporting either party.

SUMMARY OF ARGUMENT

ERISA § 502(a)(3) allows plan fiduciaries to bring a civil action to obtain "appropriate equitable relief . . . to enforce . . . the terms of the plan." 29 U.S.C. § 1132(a)(3). In *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), the Court, reaffirming earlier precedent, construed § 502(a)(3) to authorize only those forms of relief that would have been typically available in a pre-merger court of equity. The Court further concluded that a plaintiff historically could seek restitution in equity "ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* at 213.

The Fourth Circuit below, along with the Fifth, Seventh, and Tenth Circuits, correctly construed ERISA § 502(a)(3) to allow suits by plan fiduciaries to enforce reimbursement provisions where the plan fiduciary has met the criteria for restitution in equity set forth in *Great-West*. There is no reason for the Court to retreat from that conclusion, and the court of appeals correctly concluded that the plan fiduciary's suit here met those criteria. The funds are segregated in an account over which the plan participant has control, and the funds belong in good conscience to the plan by operation of the reimbursement provision. That the plan fiduciary's right to relief arises from a plan provision does not negate the characterization of the suit

as "equitable," so long as the fiduciary seeks relief in the manner authorized in *Great-West*. Section 502(a)(3) expressly allows fiduciaries to seek "appropriate equitable relief" to enforce plan terms. Were equitable relief and enforcement of plan terms mutually exclusive, that aspect of § 502(a)(3) would be rendered meaningless.

Interpreting § 502(a)(3) to foreclose the enforcement of ERISA reimbursement provisions would be inconsistent with Congress's evident intent to make all ERISA plan terms enforceable. In enacting ERISA, Congress intended to create a uniform federal scheme for the administration and enforcement of ERISA plans. Congress did not dictate the content of ERISA plans and left to employers to decide what kind and amount of benefits to provide, including whether to provide benefits at all. Rather, Congress wanted to ensure that ERISA plans are fairly and consistently administered and that the plan terms, whatever they turn out to be, are enforceable. Indeed, Congress cared so much about plan enforcement that it created an unusually "carefully crafted and detailed enforcement scheme," *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993), and then gave it "extraordinary pre-emptive power." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004).

Plan fiduciaries who seek to enforce ERISA plan terms cannot do so by invoking state law causes of action. Such actions are preempted by ERISA § 514(a) and are even "completely preempted" by § 502(a)'s enforcement provisions. *Davila*, 542 U.S. at 204. Congress intended ERISA's civil enforcement provision to be the exclusive vehicle for enforcing plan terms. *Id.* at 208-09; *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51-56 (1987). Because state law remedies are preempted, § 502(a)(3) is the exclusive means by which an ERISA plan fiduciary can enforce a reimbursement provision in an ERISA plan contract. If the Court were now to construe "appropriate equitable relief" narrowly as excluding such actions even in the circumstances allowed under *Great-West*, then ERISA plan

fiduciaries would have no remedy against plan participants who violate ERISA plan reimbursement provisions, a result that could not have been intended by Congress. Instead, § 502(a)(3) should be construed in accordance with Congress's desire to promote adherence to plan terms through appropriate enforcement mechanisms.

ARGUMENT

ERISA subjects to federal regulation employee pension and welfare benefit plans that provide "medical, surgical, or hospital care or benefits" "through the purchase of insurance or otherwise." 29 U.S.C. § 1002(1). The statute does not require employers to provide health benefit plans to their employees, nor does it dictate plan content. *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 651 (1995) (ERISA "does not go about protecting plan participants and their beneficiaries by requiring employers to provide any given set of minimum benefits, but instead controls the administration of benefit plans."); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) ("plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans"). Instead, the focus of ERISA is on providing "a uniform regulatory regime." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004).

Two features of the statute particularly carry out that purpose. First, ERISA's expansive preemption provision, § 514(a), 29 U.S.C. § 1144(a), ensures that ERISA plans are "subject to a uniform body of benefits law" and "minimize[s] the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990). Second, ERISA's comprehensive, integrated enforcement mechanism, § 502(a), 29 U.S.C. § 1132(a), ensures that ERISA plan terms are enforceable. This Court has described the enforcement scheme as "one of the essential tools

for accomplishing the stated purposes of ERISA." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52 (1987). Both the preemption provision and the enforcement scheme are relevant to the issue presented, but we turn first to the enforcement scheme.

A. ERISA's Enforcement Provisions Are Central to the Statutory Scheme and Provide for the Enforcement of All ERISA Plan Terms

ERISA's detailed enforcement mechanism is "a distinctive feature" of that statute and contrasts with many other federal statutory schemes that devote relatively little attention to enforcement mechanisms. *Davila,* 542 U.S. at 208. This Court has recognized that ERISA's enforcement provisions are "essential to accomplish Congress' purpose of creating a comprehensive statute for the regulation of employee benefit plans." *Id.* The principal civil enforcement provisions are the first three, which each address different features of plan administration. Section 502(a)(1) allows a plan participant to sue to recover benefits due under the terms of the plan, to enforce her rights under the plan, or to clarify rights to future benefits. Section 502(a)(2) allows the Secretary of Labor, plan participant, or fiduciary to bring suit for breach of fiduciary duty. Section 502(a)(3), the provision directly at issue here, authorizes civil suits brought "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan." 29 U.S.C. § 1132(a)(3).

The Court has emphasized that this enforcement scheme does not encompass every possible kind of remedy. For example, in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985), the Court held that ERISA does not authorize punitive damages for breach of fiduciary duty. In *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255-58 (1993), the Court held that § 502(a)(3), in establishing a cause of action for "appropri-

ate equitable relief," did not authorize suits for compensatory damages because that relief was not typically available in equity.

But these limitations go only to the *type* of relief available; they do not carve out a sphere of immunity from enforcement. Consistent with the centrality of the enforcement provisions to the statutory scheme, ERISA offers *some* form of remedy for *all* plan violations. Section 502(a)(1) broadly allows plan participants to recover benefits and enforce rights "under the plan." Section 502(a)(3) allows plan participants or fiduciaries to enjoin violations of "the terms of the plan" or to "obtain other appropriate equitable relief . . . to enforce . . . the terms of the plan." These provisions draw no distinction among different categories of plan provisions, instead making their enforcement tools generally applicable to all plan terms.

B. ERISA Reimbursement Provisions Are Enforceable Under § 502(a)(3) If the Criteria Set Forth in *Great-West* Are Satisfied

Despite Congress's manifest and concerted effort to provide in § 502(a) a remedy for all ERISA plan violations, petitioners assert that ERISA plan reimbursement provisions are not enforceable under the ERISA enforcement scheme because "pre-merger courts of equity would never have classified MAMSI's attempt to obtain money to fulfill a contractual reimbursement obligation as one that qualified for equitable relief." Pet. Br. 11 (footnote omitted). That broad contention contradicts this Court's analysis in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). There, the Court considered the circumstances under which ERISA plan reimbursement provisions are enforceable under § 502(a)(3). The Court interpreted § 502(a)(3)'s authorization of civil actions seeking "other appropriate equitable relief" as referring to "those categories of relief that were *typically* available in equity." *Id.* at 210. The Court explained that "a plaintiff could seek restitution in *equity*, ordinarily in the form of a constructive trust or

an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* at 213.

The Court found that this test was not met by the plan fiduciaries in *Great-West* because the funds they sought were not in the beneficiaries' possession or control but rather had been disbursed to a Special Needs Trust and to the beneficiaries' attorney. *Id.* at 214. "The kind of restitution that [the fiduciaries] seek, therefore, is not equitable – the imposition of a constructive trust or equitable lien on particular property – but legal – the imposition of personal liability for the benefits that they conferred upon [the beneficiaries]." *Id.*

The Court left open the possibility that the plan fiduciaries "could have obtained equitable relief against [the beneficiaries'] attorney and the trustee of the Special Needs Trust." *Id.* at 220. Great-West, however, had not appealed the District Court's denial of its motion to amend its complaint to add these individuals as co-defendants, and therefore the Court did not determine whether an action by Great-West against those parties would have fallen within § 502(a)(3).

In addition to the Fourth Circuit, three other courts of appeals have interpreted *Great-West* as describing circumstances under which a plan's action for reimbursement against a plan participant will be treated as seeking appropriate equitable relief. *Admin. Comm. of the Wal-Mart Assocs. Health & Welfare Plan v. Willard*, 393 F.3d 1119 (10th Cir. 2004); *Admin. Comm. of the Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan v. Varco*, 338 F.3d 680 (7th Cir. 2003), *cert. denied*, 542 U.S. 945 (2004); *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough, P.C.*, 354 F.3d 348 (5th Cir. 2003), *cert. denied*, 541 U.S. 1072 (2004). These courts did not question the correctness of the distinction this Court drew in *Great-West*, but rather focused their analysis on whether the reimbursement suit at issue satisfied the conditions

set forth there for "equitable relief" within the meaning of § 502(a)(3).

In contrast, the Ninth Circuit in *Westaff (USA), Inc. v. Arce*, 298 F.3d 1164 (9th Cir. 2002), joined two years later by the Sixth Circuit in *Qualchoice, Inc. v. Rowland*, 367 F.3d 638 (6th Cir. 2004), *cert. denied*, 125 S. Ct. 1639 (2005), essentially ignored the *Great-West* analysis and independently determined that a suit to enforce a reimbursement provision in an ERISA plan is legal in nature regardless of whether the plan participant possesses an identifiable fund. *Westaff*, 298 F.3d at 1167; *Qualchoice*, 367 F.3d at 646. Both the Sixth and Ninth Circuits concluded that such suits are legal and not equitable in nature because they seek to enforce a contractual obligation.

This cramped interpretation of "equitable relief" directly conflicts with the plain language of § 502(a)(3). That section states unequivocally that ERISA plans can bring suit "to obtain other equitable relief . . . to enforce . . . the terms of the plan." Referring to plan terms as "contractual obligations" provides no justification for avoiding the plain dictates of the statute. Congress specifically authorized suits to enforce plan terms, and therefore it necessarily used the term "equitable relief" to include such enforcement actions, whether or not the plan provisions are deemed "contractual." *See also Great-West*, 534 U.S. at 212-15 (recognizing that "restitution in equity" was available to remedy a breach of contract); *Mertens*, 508 U.S. at 253 (emphasizing that § 502(a)(3) does not "authorize 'appropriate equitable relief' *at large*, but only 'appropriate equitable relief' for the purpose of 'redress[ing any] violations or . . . enforc[ing] any provisions' of ERISA or an ERISA plan.").

The Court's statement in *Great-West* regarding the type of reimbursement suit that typically was available in a traditional court of equity was the product of extensive research and careful consideration. *See* 534 U.S. at 213 (citing 1 D. Dobbs, *Law of Remedies* § 4.3(1), at 587-88 (2d ed. 1993); *Restatement of Restitution* § 160, Comment *a*, at 641-42 (1936); 1 G. Palmer,

Law of Restitution § 1.4, at 17; *id.* § 3.7, at 262 (1978)). The Fourth Circuit, along with the Fifth, Seventh, and Eleventh Circuits properly obeyed *Great-West*'s standard, and there is no reason to retreat from it here.

C. Violations of ERISA Plan Reimbursement Provisions Cannot Be Remedied Under State Law

The Court's continued adherence to the *Great-West* standard is all the more critical because state law in this area is pre-empted. Thus, ERISA plan reimbursement provisions must be enforced through § 502(a)(3), or not at all. Section 514(a) of ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan," 29 U.S.C. § 1144(a), and saves from preemption only those state laws that regulate insurance, banking, or securities. 29 U. S. C. § 1144(b)(2)(A).

The Court has often visited the subject of the preemptive reach of § 514(a), sometimes grappling with difficult issues in defining its precise contours. *See California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A, Inc.*, 519 U.S. 316, 324 (1997) ("relate to" statutory language is "unhelpful"); *Travelers*, 514 U.S. at 655 (preemption provision is "clearly expansive" but "relate to" language should not be extended "to the furthest stretch of its indeterminacy"). The preemption principles relevant to this case, however, emerged early on in the Court's ERISA preemption jurisprudence and have remained well settled to this day.

In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983), the Court held that state laws may "relate to" employee benefit plans and thus be preempted by § 514(a) even if they are not "specifically designed to affect employee benefit plans." Soon thereafter, the Court held that common law tort and breach of contract actions for improper processing of claims for benefits "undoubtedly meet the criteria for pre-emption under § 514(a)." *Pilot Life*, 481 U.S. at 48; *see also Davila*, 542 U.S. at 219 n.6 (reaffirming holding in *Pilot Life* that the "causes of

action were pre-empted"). Therefore, even though state contract laws presumably would authorize an action to enforce a reimbursement provision in a plan, those state laws would not be immunized from preemption simply because they are laws of general applicability, rather than laws specifically directed at employee benefit plans.

In *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), the Court amplified its holding in *Pilot Life*, explaining that ERISA preempts state law causes of action for violation of ERISA plan terms because those actions "relate to" an employee benefit plan in that they are premised on the existence of an employee benefits plan. The plaintiff in *Ingersoll-Rand* filed a state court action alleging that he was wrongfully terminated because of the employer's desire to avoid contributing to, or paying benefits under, the employee's pension fund. The plaintiff asserted various state law contract and tort theories. The Court concluded that the state law cause of action "relates to" an employee benefits plan because it "makes specific reference to, and indeed is premised on, the existence of a pension plan." *Id.* at 140. As the Court observed, "there simply is no cause of action if there is no plan." *Id.*

Similarly, a state law breach of contract action to enforce an ERISA plan reimbursement provision would necessarily make direct reference to and be premised on the existence of the plan. Under the reasoning of *Ingersoll-Rand*, that action necessarily would be preempted. Absent the ERISA plan reimbursement provision, the plan fiduciary would have no state law breach of contract action. The state law action thus "relates to" the employee benefits plan because the violation of the plan term provides the basis for the action. *See Liberty Northwest Ins. Corp. v. Kemp*, 85 P.3d 871, 877-78 (Or. Ct. App. 2004) (state common law breach of contract action for reimbursement is preempted under reasoning of *Ingersoll-Rand*).

Moreover, state law breach of contract actions are not saved from preemption by the savings clause because they are not

specifically directed toward entities engaged in insurance and do not substantially affect the risk pooling arrangement between the insurer and the insured. *See Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 342 (2003). Rather, they are general common law causes of action unrelated to any insurance principles. Therefore, the savings clause would not provide a basis for a plan fiduciary to seek to enforce the reimbursement terms of the ERISA contract under state law.

Furthermore, state law causes of action in the reimbursement context are preempted not only by § 514(a) but also by the "extraordinary pre-emptive power" of § 502(a)'s enforcement provisions. *Davila*, 542 U.S. at 209; *see also Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 376 (2002) (describing "extraordinarily preemptive power" of ERISA's civil enforcement provisions). As noted in *Davila*, 542 U.S. at 211, § 502(a) completely preempts (and therefore makes removable to federal court) state law causes of action seeking to enforce "the terms of ERISA-regulated employee benefit plans." ERISA's remedial scheme thus preempts all state law causes of action that would duplicate, supplement, or supplant ERISA's civil enforcement remedy. That would be the case, even if a state law reimbursement claim somehow were saved from preemption under ERISA's insurance savings clause. *See id.* at 217.

Petitioners suggest (Pet. Br. 27 & n.14, 31-32), however, that state law remedies for enforcement of reimbursement provisions have not been preempted by ERISA. It is true that this Court did not specifically address this point in *Great-West*, stating that it "express[ed] no opinion as to . . . whether a direct action by [the insurer] against [the insured] asserting state-law claims such as breach of contract would have been pre-empted by ERISA." 534 U.S. at 220; *see also id.* at 227 (Ginsburg, J., dissenting) (suggesting that "ERISA plans and fiduciaries unable to fit their suits within the confines of the Court's opinion . . . may seek enforcement of reimbursement provisions . . .

only in state court," but some of those suits "may be preempted by ERISA itself"). But whatever doubt might have existed about the ability to enforce ERISA reimbursement provisions through state-law breach of contract actions was removed by the Court's recent decision in *Davila*. Such actions are preempted by ERISA.

D. In Accordance with the Statutory Text and the Strong Congressional Intent to Make Plan Terms Enforceable, § 502(a)(3) Should Be Interpreted to Authorize Causes of Action That Satisfy the *Great-West* Standard

Because state law causes of action to enforce ERISA plan terms are preempted, ERISA provides the sole vehicle for enforcing reimbursement provisions. Interpreting § 502(a)(3) to allow such suits – so long as they meet the *Great-West* standard – is the only result that is consistent with Congressional intent that ERISA plan terms be enforceable.

To be sure, the Court has made clear that ERISA's combination of a detailed, but not all-encompassing, enforcement scheme and preemption of state law remedies may sometimes leave a plaintiff without a type of remedy that would have been available at common law before ERISA. *See, e.g., Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993); *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985). That is because the specificity of ERISA's enforcement provisions "provide strong evidence that Congress did not intend to authorize other remedies" like punitive damages. *Id.* at 146. But that principle has no application here where the text of ERISA's enforcement provisions do encompass the remedy in question, and adoption of petitioners' position would leave plan fiduciaries with no remedy at all for a violation of plan terms.

As the Court stated in *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996), § 502(a)(3) is a "'catchall' provision" that "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately

remedy." For the reasons stated by the Court in *Great-West*, the action brought by respondent here is a suit for "equitable relief" within the meaning of that provision. Accordingly, affirmance of the decision below would adhere to the statutory text and further the evident intent of Congress to promote adherence to ERISA plans by making their terms enforceable in court.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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